IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0382
Appellee,	)	DEPARTMENT A
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
JERMAYNE DWIGHT GAINOUS,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20054136

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
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B R A M M E R, Judge.

¶1 A jury found appellant Jermayne Gainous guilty of three counts of aggravated assault with a deadly weapon and one count of first-degree murder. Gainous argues on

appeal that the trial court's failure to give an alibi instruction sua sponte was fundamental error and that the evidence was insufficient to sustain his murder conviction. We affirm.

Factual and Procedural Background

¶2 On appeal, "[w]e view the facts in the light most favorable to sustaining the verdict[s]." *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). At about 10:00 p.m. on September 17, 2005, Shane S., Zachary C., and Eric M. walked to a liquor store where they purchased beer at the drive-through window. While at the store, they encountered Gainous's mother, Charlotte; her niece, Serena; Gainous's girlfriend, Kassandra; and their infant son, Devitia. Charlotte and the others had left a party at Charlotte's house and walked to the liquor store "[t]o take some food to the people that work there" and purchase some items.

¶3 One of the men began talking to Charlotte and called Devitia "a cute mother fucker" and a "gangster." Charlotte also testified that one of the men had tried to grab Serena's hand and had asked her name. Charlotte called Joevonne B., who was at the party at her house, and told him that someone was "messing with her and the kids." Gainous, accompanied by Joevonne, drove to the liquor store to pick up Charlotte and the others.

¶4 Shane, Zachary, and Eric then left and began walking down the alley behind the liquor store. A white car driven by Gainous pulled up behind them and stopped. Joevonne was in the passenger's seat; Charlotte, Kassandra, Serena, and Devitia were in the back seat. Gainous got out of the car and confronted Shane, Zachary, and Eric, asking them

why they had been "talking shit" to his mother. He also pointed a handgun at the men and threatened to shoot them. Charlotte convinced Gainous to get back in the car, and they drove away.

¶5 Shane, Zachary, and Eric continued to walk down the alley. Gainous drove to Charlotte's house where everyone rejoined the party except Gainous, who left again in the car.[1] "No more than a minute" after the confrontation with Gainous, Zachary and Eric saw the same white car driving toward them and Shane. As the car passed them, the men attempted to hide or run away. Eric threw a beer bottle at the car, striking its passenger door. He heard a gunshot and saw a muzzle flash on the passenger side of the car, but he did not see who fired the shot. Although Zachary also heard the gunshot, he was unable to see the car from his hiding place. The bullet struck Shane in the back, killing him.

¶6 Gainous was indicted for first-degree murder and three counts of aggravated assault with a deadly weapon. After a jury trial, he was convicted of all counts. The trial court sentenced him to life in prison without possibility of parole for twenty-five years for the murder conviction and to presumptive, 7.5-year prison terms for each assault, to be served concurrently with each other but consecutively to the life sentence for murder. This appeal followed.

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[1]Joevonne testified he had remained in the car and Gainous had then driven him to a bar. Kassandra and Charlotte also testified Joevonne had left with Gainous. Joevonne had told police, however, that he had gotten out of the car at Charlotte's house.

Discussion

Alibi Instruction

¶7 Gainous did not request an alibi instruction in the trial court but asserts on appeal that the trial court's failure to give such an instruction sua sponte was fundamental error. *See State v. Gallegos*, 178 Ariz. 1, 12, 870 P.2d 1097, 1108 (1994) ("[A] trial judge's failure to give an instruction *sua sponte* provides grounds for reversal only if such failure is fundamental error."). Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to [the] defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005), *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20, 115 P.3d at 607.

¶8 Several witnesses testified Gainous was at Charlotte's when they heard a nearby gunshot sometime after Gainous and the others had returned from the liquor store, and Kassandra testified Gainous had stayed at the house for about three minutes before leaving with Joevonne. "Evidence tending to show that the defendant had no opportunity to commit the crime because he was at another place when the crime occurred raises the alibi defense." *State v. Rodriguez*, 192 Ariz. 58, ¶ 17, 961 P.2d 1006, 1010 (1998). "To decide whether the

record reasonably supports an alibi defense, we consider evidence tending to establish when the crime occurred and evidence showing defendant's whereabouts during that time." *Id.*

¶9 The state, however, does not argue that the evidence did not support an alibi instruction. Thus, assuming arguendo that the testimony that Gainous had been at Charlotte's when gunshots were heard would permit the jury to conclude he indeed had been at the house at the time Shane was killed, he would have been "entitled to a jury instruction 'on any theory reasonably supported by the evidence.'" *State v. Lopez*, 209 Ariz. 58, ¶ 10, 97 P.3d 883, 885 (App. 2004), *quoting State v. Johnson*, 205 Ariz. 413, ¶ 10, 72 P.3d 343, 347 (App. 2003). "A defendant is not required to prove an alibi; rather, the jury must acquit a defendant if the alibi evidence raises a reasonable doubt about whether the defendant committed the crime." *Rodriguez*, 192 Ariz. 58, ¶ 25, 961 P.2d at 1011. The failure to give a requested alibi instruction when that instruction is supported by the evidence is reversible error "[b]ecause the standard burden of proof instructions do not redress the risk of burden shifting engendered by alibi evidence." *Id.* ¶ 26. Our supreme court also noted that "[t]he alibi instruction . . . redresses the fundamental risk that the jury may interpret the defendant's failure to prove his alibi as proof of guilt." *Id.* ¶ 25. In *Rodriguez*, however, unlike here, the defendant had requested an alibi instruction. *Id.* ¶ 15. We do not, therefore, read *Rodriguez* to mean that a trial court's failure to give an unrequested alibi instruction is necessarily fundamental error. Indeed, our supreme court stated in *Rodriguez* that a trial court's failure

to give a requested alibi instruction "does not mandate reversal" and should be reviewed for harmless error. *Id.* ¶ 27.

¶10 We evaluate the omission of a jury instruction "in light of the totality of the circumstances." *State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991). Generally, a trial court does not err by refusing to give a particular jury instruction if the other instructions given "fairly represent[] the applicable law." *State v. Axley*, 132 Ariz. 383, 392, 636 P.2d 268, 277 (1982). The trial court correctly instructed the jury here that it was the state's burden to prove each element of the charged offense beyond a reasonable doubt. Although our supreme court stated in *Rodriguez* that the "standard burden of proof instructions" do not properly address "the risk of burden shifting engendered by alibi evidence," 192 Ariz. 58, ¶ 26, 961 P.2d at 1011, the trial court, on two occasions—during jury selection and in preliminary instructions—informed the jury here that the burden of proof "never shifts" from the state to the defendant. And the court also instructed the jury that Gainous was not required "to prove his innocence or produce any evidence."

¶11 Although the instructions the trial court gave did not specifically address alibi, they did address the central purpose of an alibi instruction—informing the jury that it is the state's burden to prove the defendant committed the acts in question and that the burden of proof does not shift to the defendant. An alibi is not an affirmative defense. *Id.* ¶ 24. Instead, an alibi is, essentially, "a denial that the defendant committed the act." *State v. Sims*, 445 N.E.2d 245, 250 (Ohio Ct. App. 1982). Thus, an alibi instruction is "little more than a

reminder that evidence of alibi was introduced." *Id.* Although we recognize it is reversible error for a trial court to refuse a valid request for an alibi instruction, *see Rodriguez*, 192 Ariz. 58, ¶ 26, 961 P.2d at 1011, we agree with the Ohio Court of Appeals that, "if the defendant is found, beyond a reasonable doubt, to have committed the crime, then the jury necessarily must have considered and disbelieved the evidence of alibi." *Sims*, 445 N.E.2d at 250.

¶12 Moreover, an attorney may make a tactical decision not to request an alibi instruction. *See State v. Hunt*, 197 S.E.2d 513, 518 (N.C. 1973) ("[D]efendant and his counsel may determine for themselves whether they would like for the court to give such an instruction [because u]nder certain circumstances, it may be that the giving of such an instruction will so concentrate attention upon the subject of alibi as to divert attention from unrelated weaknesses in the State's case."). For these reasons, we do not agree with Gainous that the absence of an alibi instruction here necessarily prevented him from receiving a fair trial. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607; *cf. State v. Dann*, 205 Ariz. 557, ¶ 18, 74 P.3d 231, 239 (2003) ("'[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one.'"), *quoting Rose v. Clark*, 478 U.S. 570, 579, 106 S. Ct. 3101, 3106 (1986).

¶13 We conclude that a trial court's failure to give an alibi instruction sua sponte is not fundamental error if the jury was otherwise properly instructed as to the burden of proof. Our conclusion is consistent with the law in most jurisdictions. *See, e.g., United*

States v. McCall, 85 F.3d 1193, 1196 (6th Cir. 1996) ("all [federal] courts are in agreement that the failure to give an *unrequested* alibi instruction should not be deemed plain error" where "the jury is otherwise correctly instructed concerning the government's burden of proving every element of the crimes charged, and the defendant is given a full opportunity to present his alibi defense in closing argument"); *Martin v. State*, 885 A.2d 339, 349 (Md. Ct. Spec. App. 2005) (failure to give alibi instruction sua sponte not plain error because jury otherwise properly instructed on burden of proof); *State v. Long*, 925 S.W.2d 220, 222 (Mo. Ct. App. 1996) (trial court has no duty to give alibi instruction if not requested); *State v. Swint*, 835 A.2d 323, 330 (N.J. Super. Ct. App. Div. 2003) (failure to give unrequested alibi instruction not plain error); *Sims*, 445 N.E.2d at 250 (same); *but see Gardner v. State*, 397 A.2d 1372, 1374 (Del. 1979) ("[W]here a defendant offers an alibi defense by introducing substantial evidence showing that he was elsewhere when the crime was committed, the Trial Judge should give an alibi instruction, and the failure to do so in those circumstances, even without a request from the defendant, will be deemed plain error."); *see generally* Frank D. Wagner, Annotation, *Duty of Court, in Absence of Specific Request, To Instruct on Subject of Alibi*, 72 A.L.R.3d 547 (1976).

¶14 Gainous argues: "An alibi instruction, like a self-defense instruction, instructs the jury regarding burden of proof, specifically, it prevents a jury from believing that a defendant bears the burden of proving his alibi." He relies primarily on *State v. Hunter*, 142 Ariz. 88, 688 P.2d 980 (1984). In *Hunter*, our supreme court determined it was fundamental

error for a trial court to give a self-defense instruction that the jury could have interpreted as shifting the burden to the defendant to prove that his actions were justified by self-defense.[2] 142 Ariz. at 90, 688 P.2d at 982. Unlike in *Hunter*, however, the jury here was not given a misleading instruction. The trial court instead gave correct instructions regarding the state's burden of proof that accomplished the purpose of the alibi instruction even if they did not specifically address alibi.[3] Moreover, we find no Arizona authority holding a trial court fundamentally errs by failing to give a self-defense instruction when the defendant does not request one.[4] Additionally, Gainous argued his alibi defense in his closing argument, albeit without the benefit of an instruction. *See State v. Russell*, 175 Ariz. 529, 533, 858 P.2d 674,

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[2]When *Hunter* was decided, the defendant first had to "present evidence sufficient to raise a reasonable doubt about whether his conduct was justified." Once the defendant had done so, "the burden [wa]s on the state to prove beyond a reasonable doubt that the conduct was not justified." 142 Ariz. at 89, 688 P.2d at 981. In 1997, the legislature enacted A.R.S. § 13-205, which placed the burden on the defendant to prove self-defense by a preponderance of the evidence. 1997 Ariz. Sess. Laws, ch. 136, § 4; *see also State v. Casey*, 205 Ariz. 359, ¶ 29, 71 P.3d 351, 358 (2003). In 2006, § 13-205 was modified to place the burden on the state to "prove beyond a reasonable doubt that the defendant did not act with justification" if the defendant presented "evidence of justification." *See* 2006 Ariz. Sess. Laws, ch. 199, § 2.

[3]Gainous's reliance on *State v. Mincey*, 130 Ariz. 389, 397-98, 636 P.2d 637, 645-46 (1981), in which our supreme court found fundamental error where the jury had been given a misleading intent instruction, is similarly misplaced.

[4]Gainous cites both *State v. Denny*, 119 Ariz. 131, 579 P.2d 1101 (1978), and *State v. Garcia*, 114 Ariz. 317, 560 P.2d 1224 (1977), for the proposition that "the jury must be separately instructed regarding the burden of proof in cases involving self-defense claims." In both those cases, however, the defendant had requested a self-defense instruction. *Denny*, 119 Ariz. at 134, 579 P.2d at 1104; *Garcia*, 114 Ariz. at 320, 560 P.2d at 1227.

678 (App. 1993) (appellate court may consider counsel's closing arguments when assessing adequacy of jury instructions). Accordingly, there was no fundamental error here.

Sufficiency of the Evidence

¶15 Gainous next argues the evidence was insufficient to support his conviction for first-degree murder. "In reviewing the sufficiency of evidence, we view the facts in the light most favorable to upholding the jury's verdict and resolve all reasonable inferences against the defendant." *State v. George*, 206 Ariz. 436, ¶ 3, 79 P.3d 1050, 1054 (App. 2003). "We will not disturb a defendant's conviction unless there is a complete absence of probative facts to support the verdict, and unless rational jurors could not have found the defendant guilty beyond a reasonable doubt." *Id.* (internal citation omitted). Gainous argues the evidence was insufficient because no witness identified him as the person who fired the gun and because "there was no forensic evidence connecting [him] to the shooting."

¶16 Neither Zachary nor Eric identified Gainous as the person who fired the gun. They could not identify any of the people in the car he was driving nor even say how many people had been in the car. And the evidence was conflicting as to whether Gainous had dropped all the car's occupants off at the party or had remained at the party with them, or whether Gainous had left the party alone or with Joevonne after dropping off the others.[5]

[5]Gainous makes much of the fact that there was conflicting testimony about what kind of car he had been driving. As the state correctly points out, however, those conflicts are not significant given that Zachary and Eric testified the white car from which the gun was fired was the same white car Gainous had been driving earlier.

Resolving these inconsistencies, however, is the province of the jury. *See State v. Canez*, 202 Ariz. 133, ¶ 39, 42 P.3d 564, 580 (2002) ("[T]he credibility of witnesses is a matter for the jury."); *State v. Williams*, 209 Ariz. 228, ¶ 6, 99 P.3d 43, 46 (App. 2004) ("Although the record contains some conflicting evidence, it was for the jury to weigh the evidence and determine the credibility of the witnesses.").

¶17 The lack of a direct identification of Gainous as the shooter is not fatal to the state's case. *See State v. Nash*, 143 Ariz. 392, 404, 694 P.2d 222, 234 (1985) ("Criminal convictions may rest solely on circumstantial proof."); *see also State v. Bible*, 175 Ariz. 549, 560 n.1, 858 P.2d 1152, 1163 n.1 (1993) ("There is . . . no distinction between the probative value of direct and circumstantial evidence."). Nor was the state required to produce forensic evidence linking Gainous to the crime. *See Canez*, 202 Ariz. 133, ¶ 42, 42 P.3d at 580 ("Physical evidence is not required to sustain a conviction where the totality of the circumstances demonstrates guilt beyond a reasonable doubt."). Also, the recordings of Charlotte's, Kassandra's, and Joevonne's interviews with police officers, although offered to impeach their testimony, could properly be considered by the jury as substantive evidence. *State v. Mills*, 196 Ariz. 269, ¶ 21, 995 P.2d 705, 710 (App. 1999).

¶18 Zachary and Eric testified that they had seen Gainous with a gun and that the car from which the fatal shot was fired was the same car Gainous had been driving a short time before. Additionally, all of Gainous's passengers, in either their trial testimony or

police interviews, stated they had been dropped off at Charlotte's house after the first confrontation with Zachary, Shane, and Eric.

¶19 These facts would permit a jury to conclude that Gainous had been the sole occupant of the car when it returned, and, thus, must have been the person who shot Shane. Even if the jury believed Joevonne had returned with Gainous, it could properly conclude Gainous had fired the shot because it was Gainous, not Joevonne, who had threatened the men with a gun just a short time before, while Joevonne remained in the car. *Cf. State v. Gulbrandson*, 184 Ariz. 46, 61, 906 P.2d 579, 594 (1995) (evidence of previous assault relevant in murder trial because it "shows motive and intent"). Viewed in the light most favorable to upholding Gainous's first-degree murder conviction, the evidence was sufficient for a jury to conclude beyond a reasonable doubt that Gainous killed Shane. *See George*, 206 Ariz. 436, ¶ 3, 79 P.3d at 1054.

Disposition

¶20 We affirm Gainous's convictions and sentences.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

JOHN PELANDER, Chief Judge